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IN THE

Supreme Court of the United States

October Term, 1960

No. 675

GREAT COVE REALTY CO., INC., and DEVONSHIRE CONSTRUCTION CORP.,

Appellants,

against

HARRY C. BRENNER, District Attorney of the County of Suffolk, and TRUSTEES OF THE SHINNECOCK INDIAN TRIBE,

Appellees.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL

ARTHUR KARGER,
Counsel for Appellants,
1271 Avenue of the Americas,
New York 20, N. Y.

Co-Counsel:
MORRIS PERMUT,
170 Broadway,
New York 38, N. Y.

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Appellants will not burden this Court with a repetition of what is set forth in their Jurisdictional Statement, but will instead confine themselves to the contentions advanced in appellees' affidavit and brief in support of their motion to dismiss this appeal.

I.

As to the Jurisdiction of This Court.

Appellees have in no way answered the showing made in appellants' Jurisdictional Statement (pp. 12-14) that the questions presented by this appeal with regard to the jurisdiction of the New York State Courts were timely raised, under the decisions both of this Court and of the New York

Court of Appeals, (a) on the motion for reargument in the Court of Appeals following the initial decision by that Court, (b) on the motion for reargument in the Appellate Division following that Court's decision on the remand from the Court of Appeals, and (c) on the subsequent motion for leave to appeal in the Court of Appeals, and that by their denial of those motions the State Courts necessarily decided the questions adversely to appellants' position.

Appellees (Br., pp. 8-10) urge that appellants expressly waived any question of jurisdiction at the trial in the County Court. That claim, however, is completely without merit. It was thus pointed out in the very opinion rendered by the majority of the New York Court of Appeals in this case, on which appellees rely, that "it is well settled that parties may not by their consent confer jurisdiction over the *subject matter* on a court" (*Matter of Brenner* v. *Great Cove Realty Co.*, 6 N. Y. 2d 435, 442).

That Court then went on to hold that appellants had waived their right of trial by jury, differentiating between that right and the right to raise the objection of lack of jurisdiction over the subject matter (*id.*, 6 N. Y. 2d at 442-3). The questions presented by this appeal, however, directly concern the issue of jurisdiction over the subject matter, and it is undisputed that under New York law an objection of that kind is never waived and can be raised at any stage of the litigation (see *Matter of Brenner* v. *Great Cove Realty Co.*, *supra*, 6 N. Y. 2d 435, 442; see also cases cited in applts.' Jurisdictional Statement, pp. 12-13).

II.

As to the Substantiality of the Questions Presented.

Appellees (Br., pp. 8, 10-11, 14) contend that the questions presented by this appeal "are not novel or new, since they have been determined by his Court heretofore." That position, however, is not a tenable one, and is in no way supported by the cases cited by appellees.

Appellees' reliance on this Court's decision in *State of New York* v. *Dibble*, 62 U. S. 366, 21 How. 366, 16 L. Ed. 149, is completely misplaced. As is shown in appellants' Jurisdictional Statement (pp. 15-21), that decision upheld the validity of an earlier version of Section 8 of the Indian Law on the basis of a narrow interpretation of the statute by the New York State Courts under which its application was limited to intrusions on lands *indisputably* owned by an Indian Tribe. This Court there held no more than that the statute, *as so interpreted*, was a valid exercise of the State's police power for the preservation of the peace. The rationale of this Court's decision in the *Dibble* case, *supra*, is, however, here inapplicable, in view of the greatly broadened scope accorded to the statute by the changed interpretation applied in this case by the New York Court of Appeals.

The case of *Seneca Nation of Indians* v. *Christie*, 160 U. S. 283, 40 L. Ed. 970, 16 S. Ct. 828, on which appellees also rely, is similarly not in point. All that this Court there held was that no Federal question was presented by the decision of the New York Court of Appeals in that case that an Indian Tribe which chose to avail itself of a special state statute permitting it to bring an action of ejectment could do so only subject to the time limitations specified in the governing statute (160 U. S. at 289).

The case of *St. Regis Tribe* v. *State of New York*, 5 N. Y. 2d 24, cert. den. 359 U. S. 910, is likewise not in point, since the action there involved was brought after the effective date of 25 U. S. C., Section 233, enacted in 1950 (see applts.' Jurisdictional Statement, pp. 5-6).

The matter quoted in appellees' brief (pp. 14-15) from *Williams* v. *Lee*, 358 U. S. 217, 221, Note 6, similarly refers only to the grant of jurisdiction given to the State Courts by Congressional statute (citing, *e.g.*, 25 U. S. C., § 233), thereby recognizing the paramount jurisdiction of Congress in this area.

Appellees (Br., pp. 11-13) further make the unsubstantiated claim that the Shinnecock Indian Tribe has never been subject to Federal jurisdictional supervision, and that 25 U. S. C., Section 233, was intended only to apply to seven other Indian Tribes and not to the Shinnecock Tribe. It is clear, however, that the paramount authority of the Federal Government extends to all Indian Tribes in New York, as well as to those elsewhere in the country (see applts.' Jurisdictional Statement, pp. 22-24).

There is nothing in the applicable decisions or in the Congressional Committee Reports accompanying the bill which culminated in 25 U. S. C., Section 233, to support appellees' claim that the Shinnecock Tribe is not subject to Federal jurisdiction or that it was excluded from the scope of that enactment. Indeed, as is pointed out in the Senate Committee Report (quoted in applts.' Jurisdictional Statement, pp. 22-23), the provisions embodied in 25 U. S. C., Section 233, were deemed necessary even though it was recognized that "The Indian reservations in the State of New York have never been owned by the United States", "were not set up under any treaty made with the United States", and "were not set up under any act of Congress or Executive order", and that the State of New York had exercised "its wardship over these Indians". (See Report No. 1836 of Senate Committee on Interior and Insular Affairs, 81st Cong., 2nd Sess., June 15, 1950, p. 2.)

CONCLUSION

The questions presented by this appeal were timely raised and are properly before this Court, and are substantial and of public importance; and the motion to dismiss this appeal should be denied.

Respectfully submitted,

ARTHUR KARGER,
Counsel for Appellants,
1271 Avenue of the Americas,
New York 20, N. Y.

Co-Counsel:
MORRIS PERMUT,
170 Broadway,
New York 38, N. Y.